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CHALLENGING DISCRIMINATION OF LGBT YOUTH IN JUVENILE JUSTICE: ENCOURAGING THE LEGAL STRATEGY OF SELECTIVE PROSECUTION MOTIONS

by Alanna Holt

Introduction

The gay, lesbian, bisexual, and transgender (LGBT) rights movement is in a period of profound transformation. This transformation has involved rapidly expanding support, both publically and politically, for gay marriage, for the acceptance and understanding of “non-traditional” gender identities, and for the integration of the LGBT community into social, familial, cultural, and political life.¹

This progress is contrasted starkly by the realities facing LGBT youth, who continue to be abused and ostracized, and whose sexual orientation and gender identities are essentially criminalized by being targeted by the juvenile justice system. LGBT youth—particularly youth of color in poor communities—are significantly over-represented in the homeless population and the juvenile justice system.² Although gay and transgender youth make up approximately five to seven percent of the country’s overall youth population,³ they make up approximately thirteen percent of youth in detention facilities.⁴ LGBT youth face a wide

range of intensely abusive and discriminatory treatment in their home lives, at school, in their broader communities, and by police, prosecutors, and correctional officials.⁵ Criminal justice officials charged with protecting youth in the juvenile system, such as juvenile defenders, probation officers, and social workers, frequently fail to competently represent the youth’s interests and protect them from discrimination and abuse.⁶ This maltreatment persists because of a critical lack of recognition of the particular challenges facing LGBT youth both in and outside of the juvenile justice system.⁷ Youths with non-traditional sexual preferences and gender identities face a higher frequency of family rejection and unstable home conditions, which results in a higher risk of contact with the juvenile justice system.⁸ LGBT youth also

IN JUVENILE COURTS 10 (2009), available at http://www.equity-project.org/pdfs/hidden_injustice.pdf.

5 See, e.g., *id.* at 3–5 (describing how police target LGBT for certain crimes and how schools fail to adequately address harassment that LGBT youth face).

6 See Jody Marksamer, *In Defense of LGBT Youth: Strategies to Help Juvenile Defenders Zealously Advocate for their LGBT Clients*, in *Practitioner’s Section*, 15 U.C. DAVIS J. JUV. L. & POL’Y 401, 403–05 (2011) (commenting that advocates sometimes have biases or a lack of understanding on how to work with LGBT youth, which hinders their ability to properly advocate).

7 See Majd et al., *supra* n. 4, at 4 (noting that some advocates have misconceptions about the LGBT community, such as not knowing the difference between gender and sexual orientation or the difference between transgender and gay, lesbian, or bisexual).

8 See Hunt & Moodie-Mills, *supra* n. 2, at 1 (stating that because our system is not equipped to handle the unique struggles LGBT youth face, they become unfairly criminalized).

1 See generally *Our Victories*, Human Rights Campaign, <http://www.hrc.org/the-hrc-story/our-victories> (last visited Feb. 18, 2014) (detailing the expansion of LGBT rights).

2 Jerome Hunt & Aisha C. Moodie-Mills, CENTER FOR AMERICAN PROGRESS, *THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH* 1 (2012), available at <http://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/>.

3 *Id.*

4 Katayoon Majd et al., THE EQUITY PROJECT, *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANS-GENDER YOUTH*



face higher risks of prosecution for crimes arising from family rejection or domestic disputes, sex-related crimes, such as statutory rape and prostitution, and ultimately “survival crimes” associated with homelessness.⁹

Unfortunately, efforts to address the disproportionate impact of the juvenile justice system on LGBT youth have been inadequate.¹⁰ In 2009, The Equity Project¹¹ produced a com-

tation of LGBT youth. Juvenile defenders are uniquely situated to fight for the equal and fair treatment of LGBT youth in the juvenile justice system and to combat the selective targeting of these youth by law enforcement and the courts. Unfortunately, juvenile defenders frequently do not realize a client is LGBT or may not understand how a client’s LGBT status influenced the client’s contact with the system.¹³ This article will argue that, in addition

prehensive report entitled “Hidden Injustice: Lesbian, Gay, Bisexual, & Transgender Youth in Juvenile Courts,” which detailed the ways that juvenile justice professionals are unprepared to effectively address the unique challenges that confront LGBT youth both in and out of the system. The report also provides tools for actors in the system to ensure LGBT youth are treated fairly by the courts, correctional facilities, and their communities.¹²

This paper will focus on the represen-

to the current recommendations available to juvenile defenders in their representation of LGBT youth, juvenile defenders should be encouraged to explore filing selective prosecution motions.

Comprehensive recommendations and resources for juvenile defenders with LGBT clients are available, including the extensive recommendations in the Equity Project’s report.¹⁴ Still missing from these resources are specific strategies for juvenile defenders to seek relief based on constitutional violations. For instance, due process and equal protection challenges have been raised in response to the discriminatory treatment of LGBT youth in schools and correctional facilities.¹⁵ Juvenile defenders can take advantage of the constitutional implications of discriminatory treatment through the use of selective prosecution mo-

and deprived of their civil rights).

9 See, e.g., Majd et al., *supra* n. 4, at 71–74, 143 (describing the charges often brought against LGBT youth often face, including ungovernability, various survival crimes—prostitution, shoplifting, and selling drugs—and domestic dispute charges).

10 See generally Marksamer, *supra* n. 6, at 403–05.

11 The Equity Project’s mission is

To promote leadership and provide guidance regarding lesbian, gay, bisexual, and transgender (LGBT) youth in the juvenile justice system, Legal Services for Children, the National Center for Lesbian Rights, and the National Juvenile Defender Center joined in 2005 to launch the **Equity Project**. The Equity Project represents a unique collaboration of individuals and organizations with diverse expertise relevant to LGBT youth in the juvenile justice system.

Majd et al., *supra* n. 4, at v (emphasis in original).

12 Marksamer, *supra* n. 6, at 404.

13 *Id.* at 407, 411 (explaining the need for defenders to ask a client if he or she is LGBT and to not proceed with their representation based on assumptions).

14 Majd et al., *supra* n. 4, at 137–38.

15 See, e.g. *R.G. v. Koller*, 415 F.Supp.2d 1129; *Flores v. Morgan High School District*, 324 F.3d 1130, 1138 (9th Cir. 2003). (“Plaintiffs’ claim that the defendants’ response or lack of response to complaints of student-to-student anti-homosexual harassment denied them equal protection.”); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).



tions. This strategy has been recommended in one area, the disproportionate targeting of LGBT youth for violations of statutory rape laws.¹⁶ In the case of statutory rape, LGBT youth are disproportionately prosecuted for engaging in consensual sexual conduct where similarly situated heterosexual youth would not be prosecuted.¹⁷

Juvenile defenders should be prepared to file such motions in cases where an LGBT youth's status specifically influenced the decision to prosecute, as opposed to those instances where their gender or sexual orientation influenced the circumstances leading to their contact with the system, such as homelessness, harassment, or abuse. Prosecutions arising directly from a LGBT youth's status include "in-corrigibility" or "ungovernability,"¹⁸ statutory rape, and prostitution.¹⁹

Pursuing selective prosecution motions for those crimes could have several benefits in challenging the disparate treatment of LGBT youth in the juvenile justice system. First, such motions, while difficult to win, present a form of legal relief for LGBT clients.²⁰ Second, selective prosecution motions and the accompanying discovery provide the chance to present numerical and anecdotal data of the discriminatory experiences of LGBT youth in the system; this data illuminates the maltreatment experienced by LGBT youth and educates judges, prosecutors, and the community at large. Third,

¹⁶ See generally Michael H. Meidinger, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision Making Involving Queer Youth & Statutory Rape*, 32 B.C. J. L. & SOC. JUST. 421 (2012) (describing how prosecutorial discretion and societal norms lead to the selective prosecution of LGBT youth).

¹⁷ *Id.* at 421–22 (providing that certain provisions in the law intended to protect youth from prosecution for statutory rape do not equally apply to LGBT youth).

¹⁸ Ungovernability is defined as being beyond the control of one's parent/guardian. Many ungovernability cases involve a LGBT youth's refusal to "change" their sexual status results in a criminal prosecution.

¹⁹ See Majd et al., *supra* n. 4, at 70–74 (reporting the list of crimes that LGBT youth are disproportionately charged with committing).

²⁰ These motions also provide opportunities for appeals based on a trial court's potential abuse of discretion.

selective prosecution motions can help educate all persons associated with the juvenile justice system, as well as communities at large, on the particular challenges and persisting discrimination facing LGBT youth.

Courts are public institutions, so selective prosecution motions based on a youth's sexual orientation provide an important opportunity for the public to hear more stories of the unique experiences of LGBT youth in the justice system. Because the juvenile justice system persistently discriminates against LGBT youth while individuals inside and outside the system remain largely blind to the reality, it is critical to both create public awareness and a legal record documenting the mistreatment.

The increased use of selective prosecution motions, however, should only be done within the framework of client-centered legal representation. Such motions should not be considered without the full and informed consent of LGBT clients, or if a motion would not strengthen or aid in a client's defense. Filing such a motion amounts to "outing" a client, and many LGBT youth would prefer to keep their sexual orientation or gender identity out of their juvenile adjudications. These fears are powerfully justified by the mistreatment, abuse, isolation, and punitive responses that LGBT youth face in the system as a result of their status. Defenders should make clear to clients that such motions will be accompanied by extra measures to prevent such mistreatment and explore with their clients the benefits of a defense centered around the client's identity and the discrimination the client faces.²¹

Section I of this article will provide a general overview of the factors contributing to a higher contact of LGBT youth with the juvenile justice system. Section II discusses prosecutions for offenses that are driven almost exclusively by an LGBT youth's gender or sexual orientation. Section III will detail the current

²¹ For instance, a lawyer who stands up in a courtroom to defend a client's identity and expose vicious discrimination could empower LGBT youth as much as he or she could enlighten judges, prosecutors, and the police.



recommendations for best practices of juvenile defenders in representing LGBT youth, and the recommendation that defenders file selective prosecution motions in cases of LGBT prosecutions for statutory rape. Section IV explores how such motions could be filed in cases involving other crimes for which LGBT youth are disproportionately prosecuted. Section V argues that the expanded use of selective prosecution motions could be an important

youth, and the criminalization of their sexual orientation, also give rise to harsher treatment and punishment within the system.²⁵ This section will explain some of the persisting biases against LGBT youth, and the main external factors contributing to their disproportionate contact with and disproportionate treatment within the juvenile justice system.

tool in exposing the experience of LGBT youth in the juvenile justice system, and in the fight for their equal treatment.

I. LGBT Youth in the Justice System

LGBT youth experience a substantially higher risk of contact with the criminal justice system. The higher risk of contact that LGBT youth experience begins with pre-trial incarceration, where general rules requiring pre-trial detention—that it be imposed only when the youth is a flight or safety risk—are often ignored for LGBT youth, who are twice as likely to be detained pre-trial.²² This has a substantial impact on the likelihood of conviction—as juvenile justice specialist Dr. Marty Beyer described, “[a] kid coming into court wearing handcuffs and shackles versus a kid coming in with his parents—it makes a very different impression.”²³ Additionally, while LGBT youth represent approximately 3–10% of the overall population, LGBT youth represent 15% of the prison population.²⁴ External social factors contribute to this higher level of contact within the system, but internal biases against LGBT

A. Biases Within the Juvenile Justice System Towards LGBT Youth

Despite the disproportionate representation of LGBT youth, the criminal justice system is largely blind to the existence and experiences of LGBT youth.²⁶ Many judges actively refuse to address the sexual orientation or gender identities of juveniles; many defenders are unaware that their clients are in fact LGBT; and a large portion of LGBT youth want to keep their identities secret out of fear of the discrimination and backlash that persisting prejudices evoke.²⁷

Moreover, once justice professionals²⁸ know a youth’s transgender status or sexual orientation, many refuse to recognize or respect that youth’s identity.²⁹ Justice professionals frequently refuse to use a transgender

22 Daniel Redman, ‘I Was Scared to Sleep’: LGBT Youth Face Violence Behind Bars, THE NATION MAGAZINE, (June 21, 2010), <http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars>.

23 See *id.*

24 *Id.*

25 See Majd et al., *supra* n. 4, at 2–4 (describing barriers to LGBT youth which contribute to, and exacerbate, their overrepresentation in the juvenile justice system).

26 See *id.* at 43–45 (discussing the invisibility of LGBT youth within the system).

27 *Id.* at 44.

28 “Justice professionals” refers to a range of actors within the juvenile justice system, including juvenile defenders, probation officers, detention officers, judges, prosecutors, court personnel, and counselors.

29 *Id.* at 49–50.



youth's chosen name and preferred pronoun.³⁰ They often view a youth's clothing, appearance, and mannerisms expressing their sexual orientation or gender identity as unruly "acting out," instead of recognizing that such expressions are an important part of LGBT youth's acceptance and understanding of their own identity.³¹

The Equity Project also notes an alarming number of juvenile justice professionals who view an LGBT youth's sexual orientation or gender identity as a mental illness or indication of being sexually predatory.³² Some jurisdictions require all youth "suspected" of being LGBT to undergo a mental health evaluation.³³ Many youth report being treated as "crazy, dangerous, or unstable."³⁴ One judge, describing a case where a young lesbian assaulted a family member after her family objected to her sexual orientation, stated, "the whole case was about sensationalizing lesbians. [The prosecution] played it like she was a deranged lesbian lunatic."³⁵ In an interview with *The Nation* magazine, Krystal, a transgender youth from Louisiana, explained that her counselor told the judge of her transgender status.³⁶ The judge cited this fact specifically as the reason why he refused to grant Krystal's early release.³⁷ Her lawyer explained to *The Nation*, "many judges in rural Louisiana still conflate sex offenses with sexual orientation and gender identity."³⁸

health community that LGBT identities fall within a range of normative sexual development and the increasing acceptance of this fact in the eyes of the public, dangerous prejudices remain in the juvenile justice system.³⁹

B. Family

One main finding of the Equity Project's report was that "[f]amily rejection of LGBT youth increases the risk of their involvement in the juvenile justice system and negatively impacts their cases."⁴⁰ Studies show that LGBT youth continue to experience rejection by their families at alarming rates as a result of their gender or sexual orientation.⁴¹ One study indicated that nearly fifty percent of parents, upon finding out their child was LGBT, expe-

rienced feelings of repulsion, anger, and disappointment.⁴² In The Equity Project's survey of juvenile justice professionals, nine out of ten respondents believed that a lack of family support was a "very serious" or a "somewhat serious" problem for LGBT youth in the juvenile justice system.⁴³

Family rejection and a lack of family support have far reaching consequences. Family conflicts that arise out of a youth's gender

Despite broad consensus in the mental

30 *Id.* at 50.

31 *See* Majd et al., *supra* n. 4, at 49 (commenting that medical professions believe it is important to allow LGBT individuals to express their identity).

32 *See id.* at 51–52 (proving the story of one LGBT youth who was asked by a staff member, in a juvenile hall, if he was gay because he had been molested).

33 *Id.* at 52.

34 *Id.*

35 *Id.*

36 Redman, *supra* n. 19, at 17.

37 *See also id.* (describing how the judge laughed and found the recommendation for an early release a joke).

38 *Id.*

39 *See* Majd et al., *supra* n. 4, at 51–52 (stating that thirty-five years of research have shown that LGBT identities are not associated with mental disorders, social or emotional problems, or sexual abuse).

40 *See id.* at 3 (reporting the frightening statistics associated with family rejection and entry of LGBT youth into the juvenile justice system).

41 *Id.* at 70.

42 *See also id.* (noting that almost 30% of LGBT youth experienced physical abuse by a family member because of their sexual orientation or gender identity).

43 *Id.*



identity or sexual orientation increase the risk that the youth will run away from home and become homeless.⁴⁴ Indeed, LGBT youth are disproportionately represented in the youth homeless population—they make up between twenty and forty percent of homeless youth.⁴⁵ In one study of LGBT homeless youth, thirty-nine percent reported they had been forced out of their homes because of their sexual orientation or gender identity.⁴⁶ Additionally, forty-five

percent reported involvement with the juvenile justice system.⁴⁷ Parental disapproval also creates a heightened risk of domestic disputes, physical altercations, and parental attempts to use the courts as a means of “changing” their child’s gender identity or sexual orientation through ungovernability charges, domestic violence or assault charges, or statutory rape charges.⁴⁸

C. School Harassment

Another related social factor contributing to increased LGBT involvement in the juvenile justice system is the pervasive harassment and bullying LGBT youth face in school.⁴⁹ LGBT youth experience persistent

violations.⁵²

II. Selective Targeting of LGBT Youth for Specific Offenses

In addition to external factors increasing their risk of contact with the juvenile justice system and the biased treatment they face within the system, LGBT youth are specifically targeted for certain crimes due to their gender identity or sexual orientation. This disproportionate targeting frequently begins with aggressive, discriminatory policing of LGBT youth because of their gender identity or sexual orientation.

as “faggot” or “dyke” frequently at school); *see also* Gay, Lesbian, and Straight Education Network (GLSEN), *Harsh Realities: The Experience of Transgender Youth in Our Nation’s Schools* (2009), available at <http://glsen.org/sites/default/files/Harsh%20Realities.pdf>.

50 *See id.* (noting that 84% of LGBT youth had been verbally harassed due to their sexual orientation); *see also* Majd et al., *supra* n. 4, at 75–76 (noting that LGBT students are more likely to be involved in a physical fight, threatened, or harmed with a weapon than non-LGBT students).

51 *E.g.*, Majd et al., *supra* n. 4, at 76–77 (describing one example where though the LGBT youth had been bullied for a long time, the school police asked the youth accusatory questions such as ‘Why were they calling you a faggot?’).

52 *See id.* at 76 (finding that 32.7% of LGBT youth skipped school because they felt unsafe).

44 *See id.* at 71 (declaring many LGBT run away because they experience physical and verbal abuse at home).

45 Nicholas Ray, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1* (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>; *see also* Majd et al., *supra* n. 4, at 70.

46 Majd et al., *supra* n. 4, at 72.

47 *Id.*

48 *Id.* at 71; *see also infra* Section II (listing the specific offenses LGBT youth are specifically targeted for).

49 *See, e.g.*, LAMBDA LEGAL, *FACTS: LGBT YOUTH IN SCHOOL 1*, available at <http://data.lambdalegal.org/pdf/158.pdf> (revealing that 77.9% of LGBT students heard epithets such



A. Selective Police Targeting

LGBT youth are more likely to be arrested and charged for violations of laws relating to sexual expression, “quality of life,” and status offenses—such as loitering, public drunkenness, public urination, running away, and littering—than their heterosexual counterparts.⁵³ Police frequently equate homosexuality with deviancy and criminality—a prejudice that pervades the attitudes of judges and prosecutors as well.⁵⁴ Research revealed that LGBT youth are profiled by law enforcement based on their gender identity or sexual orientation. Rather than basing investigatory stops or searches on reasonable, articulable suspicion of criminal activity, police will view perceived LGBT status as suspicious or criminal in and of itself. One Amnesty International Report exploring this issue concluded:

[Amnesty International’s] research has revealed that law enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to ‘morals regulations,’ bars and social gatherings, demonstrations and ‘quality of life.’ Transgender individuals in particular report being profiled as suspicious or as criminals while going about everyday business such as shopping for groceries, waiting for the bus, or walking their dogs.⁵⁵

There is an obvious logical connection between discriminatory policing and a disproportionate amount of criminal prosecutions aimed at LGBT youth. A disproportionately higher volume of arrests of LGBT youths means that a disproportionate volume of this category

of youth will also be prosecuted. Therefore, police targeting of LGBT youth contributes to their disproportionate representation in the juvenile system.

B. Ungovernability

LGBT youth are also at risk of having their sexual orientation or gender identity criminalized directly. One offense for which LGBT youth are selectively targeted almost exclusively based on their gender identity or sexual orientation is “ungovernability.” A report prepared for the Department of Justice defined “ungovernability” as follows:

When a youth’s disobedience reaches a crisis level, the family may reach a breaking point and seek the assistance of probation officers, family court judges, and child welfare workers to take control of their troubled children. The youth may subsequently be classified as ‘ungovernable’ or ‘incorrigible,’ which can result in a petition to have the youth adjudicated as a status offender and face sanctions ranging from probation to out-of-home placement to secure detention.⁵⁶

According to the report, eight percent of ungovernability cases in 2004 resulted in detention; eighteen percent resulted in an out-of-home placement for the youth; and sixty-two percent resulted in probation.⁵⁷

Interviews conducted by The Equity Project revealed that many inter-family conflicts between LGBT youth and their parents led prosecutors to file charges of ungovernability.⁵⁸ One intake officer reported that nine out of ten LGBT youth entering the system in her jurisdiction had been charged with “ungovernability, curfew violations, or truancy, all based primarily on the parents’ objections to their

53 *Id.* at 61.

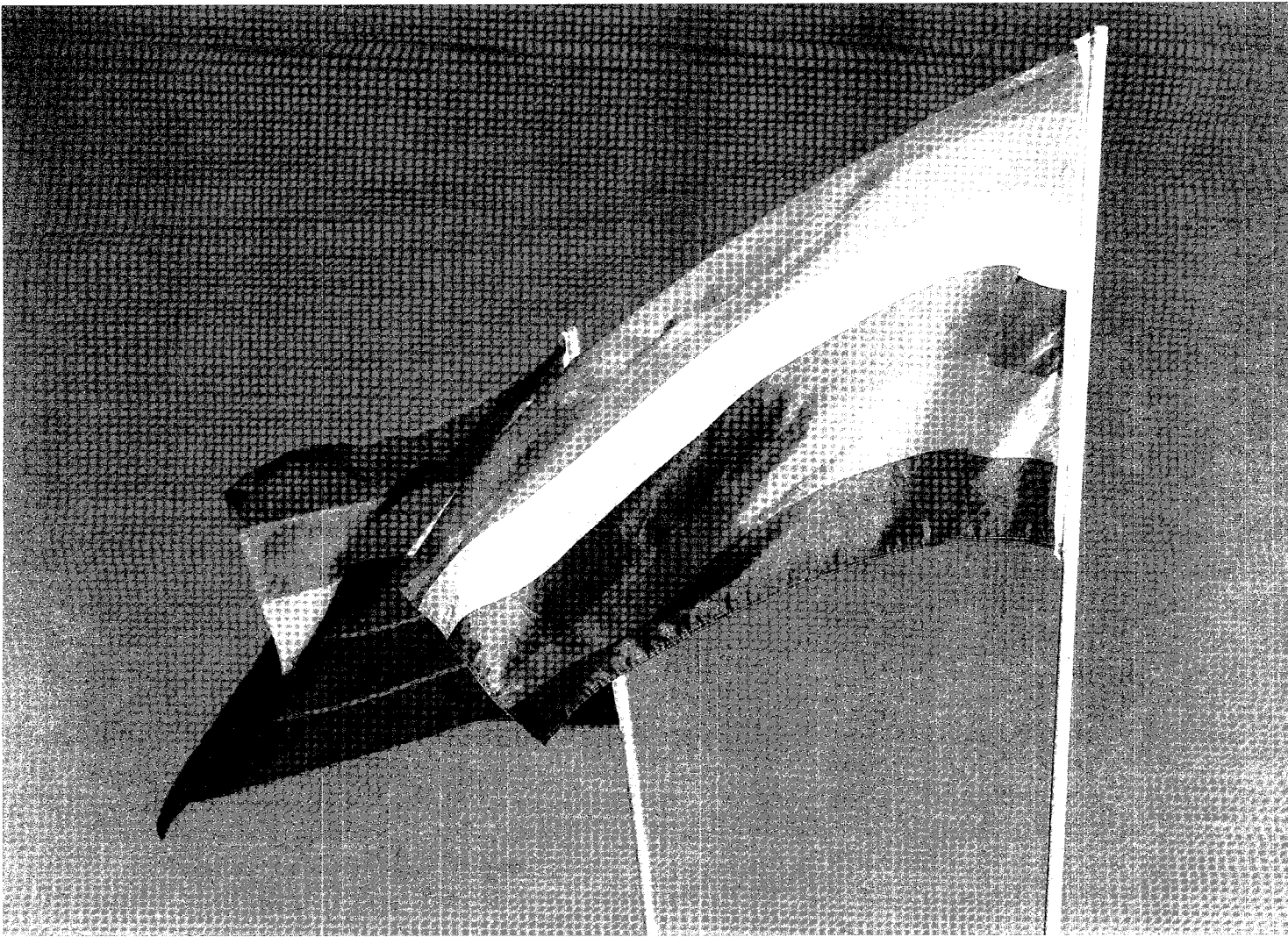
54 *Id.*

55 AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 4 (2003), *available at*, <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf>.

56 DEVELOPMENT SERVICES GROUP, INC., UNGOVERNABLE/ INCORRIGIBLE YOUTH LITERATURE REVIEW 2 (2009), *available at*, <http://www2.dsgonline.com/dso2/Ungovernable%20Youth%20Literature%20Review.pdf>.

57 *Id.*

58 Majd et al., *supra* n. 4, at 71.



children's sexual orientation."⁵⁹

As identified by that intake officer, ungovernability charges are often accompanied by other status offenses such as curfew violations or truancy, which, as identified in Section I, may also be linked to an LGBT youth's parental rejection. Sometimes, however, the charge is brought against an LGBT youth in absence of any other chargeable behavior—a report on the treatment of LGBT youth in Louisiana identified one example:

In 2009, an eleven-year-old youth in Louisiana was taken into Judge's chambers without his attorney to discuss his sexual orientation. His mother was then called in and questioned about his sexual orientation. The eleven-year-old, who had no delinquency charges, was placed in detention as his disposition, partly at

his mother's request, who perceived her child to be gay, and thus, 'ungovernable.'⁶⁰

That same report identifies LGBT youth in Louisiana as being at risk for ungovernability charges, even in the absence of any previous court involvement or criminal record.⁶¹ *The Nation* magazine's investigation into LGBT youth identified cases of incarceration disguised as "treatment" of LGBT youth based exclusively on their sexual orientation or gender identity. For example, at the parents' request, a judge in Mississippi ordered a lesbian youth to a private

⁵⁹ *Id.*

⁶⁰ Wesley Ware, LESBIAN, GAY, BISEXUAL, & TRANSGENDER YOUTH IN LOUISIANA'S JUVENILE JUSTICE SYSTEM: LOCKED UP AND OUT 16 (2007), available at <http://jjpl.org/site/wp-content/uploads/2011/07/locked-up-and-out.pdf>.

⁶¹ See *id.* at 14 (explaining how this charge drives the youth deeper into the system because they will typically face more discrimination once they are outside of their home environment).



hospital in order to “cure” her homosexuality.⁶² In Georgia, a child who came out as transgender was sent to a facility for youth likely to commit sex crimes against children even though the child had never committed a sexual offense.⁶³

C. Prostitution

LGBT youth also face a higher risk of being arrested and charged with prostitution or soliciting sex than their heterosexual counterparts.⁶⁴ Police frequently profile and harass LGBT youth on suspicion of prostitution based entirely on their gender identity or sexual orientation. One youth interviewed by the Equity Project described this harassment:

[The LGBT youth said] that a police officer stopped him as he was walking on the street, dressed in drag (i.e. wearing a wig, dress, make-up, etc.), and insisted on seeing identification. “[The police officer] said that the reason he stopped me was suspicion of soliciting sex . . . I had to show him evidence that I was going to a drag show before they let me go . . . Whenever I would dress up in drag, [the police harassment] was horrible.”⁶⁵

Another LGBT youth explained that streets frequented by trans-youth are aggressively patrolled by police who stop youth on the street and ask, “[y]ou’re working, right?”⁶⁶ While not focused exclusively on LGBT youth, Amnesty International also “found a strong pattern of police unfairly profiling transgender women as sex workers” in Los Angeles, Chicago, New York, San Antonio, Washington, D.C., Philadelphia, San Francisco, and Houston.⁶⁷ In addition to being selectively targeted, increased rates of homelessness raise the risk

LGBT youth will engage in prostitution as a “survival crime.”⁶⁸

D. Age of Consent Laws

The discriminatory application of statutory rape laws, and in some instances, overtly exclusionary exceptions to statutory rape reveal that LGBT youth face selective targeting and disproportionate punishment for statutory rape.⁶⁹ Every state has age of consent or “statutory rape” laws that prohibit sexual activity with young persons under a certain age.⁷⁰ The mechanics of age of consent laws vary by state.⁷¹ Some laws set an explicit limit on the age of consent, while some laws set limits on the permissible age difference between two individuals engaged in sexual activity. Age of consent laws can apply to youths engaged in sexual activity even when they both fall under the age of consent. Many states, however, also have “Romeo and Juliet” exceptions to statutory rape laws, which provide an affirmative defense to under-age youth engaged in sexual conduct so long as they are sufficiently close in age.⁷²

In some states, Romeo and Juliet provisions are specifically written to only include heterosexual sex acts, which preclude same sex couples from using the defense and exposes LGBT youth to an even higher risk of prosecution for statutory rape. For instance, in Texas, sexual activity with a child under the age of seventeen is a felony, but an affirmative defense applies if the victim and defendant are no more than three years apart in age and of the opposite sex.⁷³ Similarly, Alabama’s statutory rape laws distinguish between “statutory rape,” which occurs between two members of the op-

68 See Heather Squatriglia, Note, *Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 CARDOZO J.L. & GENDER 793, 806 (2008) (reiterating that a youth’s sexual orientation cannot be separated from the delinquent behavior because it is often their LGBT status that leads them to juvenile justice system).

69 See Meidinger, *supra* n. 15, at 421–22.

70 Majd et al., *supra* n. 4, at 62.

71 See Meidinger, *supra* n. 15, at 426.

72 *Id.* at 422.

73 *Id.* at 432.

62 Redman, *supra* note 17.

63 *Id.*

64 See AMNESTY INTERNATIONAL, *supra* n. 52, at 16–50 (examining ways in which police profile LGBT individuals, including selective enforcement of prostitution and solicitation laws); *supra* n. 48.

65 Majd et al., *supra* n. 4, at 62.

66 *Id.*

67 AMNESTY INTERNATIONAL, *supra* n. 52, at 21.

posite sex, and “deviate sexual intercourse,” which includes sodomy (acts more frequently associated with homosexual individuals), with an individual below the age of consent.⁷⁴ Alabama offers reduced penalties for individuals two years apart who violate statutory rape prohibitions, but such reduced penalties are not offered for “deviate sexual acts” between actors two years apart.⁷⁵ California and Kansas also have discriminatory exceptions in place for youth who engage in sexual activity.⁷⁶

The consequences of these discriminatory laws are significant. In twenty-nine states, a statutory rape conviction constitutes a sex offense that requires the individual to register as a sex-offender.⁷⁷ Such status has far reaching consequences for any youth, particularly an LGBT youth who already faces demonization based on his or her perceived sexual orientation. The 2002 case of *Kansas v. Limon*,⁷⁸ illustrates a similarly grave consequence. Matthew Limon was convicted of criminal sodomy for engaging in consensual oral sex with the complainant, a boy whom he was approximately three years older than.⁷⁹ Mr. Limon was not eligible for a reduced sentence based on a statutory Romeo and Juliet exception because of the homosexual nature of his conduct.⁸⁰ He was sentenced to seventeen years in prison, followed by five years of supervision and registration as a sex offender.⁸¹ Had Mr. Limon qualified for the Romeo and Juliet exception, his sentence would have been significantly reduced.⁸² The United States Supreme Court vacated Mr. Limon’s conviction in the wake of its decision in *Lawrence v. Texas*,⁸³ and remanded

to the Kansas Court of Appeals for reconsideration.⁸⁴ The appeals court, however, upheld the discriminatory Romeo and Juliet provision using profoundly prejudicial reasoning and antiquated notions of the “dangers” associated with homosexuality: that protecting children from homosexual sex is a rational state interest, given that such acts are contrary to traditional sex norms; that the state has a preference for procreative sex; that lenity towards heterosexuals fosters parental responsibility by freeing such individuals from incarceration; and that prevention of STDs, the risk of which is “generally associated” with homosexual conduct, is a rational state interest.⁸⁵

The Supreme Court of Kansas overturned the appellate court’s decision, finding that the discriminatory Romeo and Juliet provision unconstitutional on equal protection grounds, stating, “moral disapproval of a group cannot be a legitimate governmental interest.”⁸⁶ The Kansas Supreme Court also dismissed all of the appellate court’s grounds for upholding the discriminatory provision and discredited its reliance on the false assertion that homosexual activity creates a higher risk for the spread of HIV or other STDs.⁸⁷ Though Mr. Limon’s case ultimately resulted in a victory, the State’s persistence in upholding his harsher punishment on the grounds of his homosexuality, as well as the appellate court’s acceptance of Mr. Limon’s sexual orientation as a grounds for disproportionate punishment, exemplifies the pervasive discrimination against LGBT youth that persists in the criminal justice system.

Another example of selective targeting is evident in the recent Ohio case, *In Re D.B.*⁸⁸

74 *Id.*

75 *Id.*

76 *See id.* at 433.

77 Majd et al., *supra* n. 4, at 62.

78 41 P.3d 303 (Kan. Ct. App. 2002), *vacated*, 539 U.S. 955 (2003), *remanded to*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev’d*, 122 P.3d 22 (Kan. 2005).

79 *Kansas v. Limon*, 122 P.3d 22, 24–25 (2005).

80 *Id.* at 25.

81 *Id.*

82 *Id.*

83 *See generally* *Lawrence v. Texas*, 539 U.S. 588 (2003) (holding a Texas statute criminalizing sexual conduct between members of the same sex was unconstitutional as ap-

plied to two consenting adults).

84 *Limon*, 122 P.3d at 26.

85 *See generally* *Kansas v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

86 *Limon*, 122 P.3d at 35.

87 *See id.* at 36–37 (explaining how the studies the appellate court relied on in determining the Romeo-and-Juliet law was constitutional actually would show the Romeo-and-Juliet law to be both over inclusive and under inclusive).

88 950 N.E.2d 528 (Ohio 2011), *cert. denied*, *Ohio v. D.B.*, 132 S. Ct. 846 (2011).



In that case, a twelve-year-old male, D.B., was charged with statutory rape for engaging in sexual conduct with a minor on two separate occasions: once with another twelve-year-old male, and the other with an eleven-year-old male.⁸⁹ The trial court found no evidence that force was used, but still found D.B. delinquent based on his violation of Ohio's age-of-consent law, which did not have a Romeo and Juliet provision. D.B. was ultimately placed on probation for an indefinite period of time.⁹⁰ The judge further ordered D.B. to attend counseling and group therapy. D.B. appealed, alleging that his due process and equal protection rights had been violated.⁹¹ The Supreme Court of Ohio agreed, finding the Ohio statute used to adjudicate D.B. was unconstitutional as applied in that case.⁹²

D.B.'s case serves as an important example for future selective prosecution motions in similar adjudications, even though his defense was not explicitly one of selective prosecution. First, D.B.'s appeal was rooted in discriminatory application of the law and a subsequent violation of his constitutional rights. Second, as made clear in an amicus submitted by a number of defense organizations (including the Bluhm Legal Clinic), the defense argued that the same-sex nature of the offense likely drove D.B.'s discriminatory treatment:

Although most statutes criminalizing sexual conduct between teens under the age of consent make no reference to gender or sexual orientation, there is a danger of discriminatory enforcement of these laws in accordance with stereotypes surrounding gender and sexuality. Such stereotypes are often implicit and in many cases, largely unconscious. For example, when there is male-female underage consensual sex, the male is typically viewed as the perpetrator and is thus more likely to be charged

with statutory rape. Even in cases where both youth engaging in the sexual conduct are of the same sex, prosecutors' decisions regarding which youth is victim and which is perpetrator tend to be based on who assumed which gender role in the sexual activity.⁹³

This amicus brief highlights the manner in which juvenile defenders can expose and clarify discriminatory treatment that is rooted in unexamined and unconscious biases.

III: Recommendations for Juvenile Defenders for Addressing the Unique Challenges of LGBT Youth

The Equity Project and other commentators have developed recommended best practices for juvenile defenders in their representation of LGBT youth in the juvenile justice system, both to address the external social factors impacting LGBT youth, and their discriminatory treatment within the system. These recommendations include treating LGBT youth with dignity and respect, encouraging promotion of their gender identity, engaging in training on the specific challenges facing LGBT youth, developing individualized and developmentally appropriate responses to LGBT behavior, working to avoid unnecessary detention and incarceration, advocating for programs or alternatives for out of home placements, and respecting the confidentiality and privacy of LGBT youth, among others.⁹⁴ Another important recommendation for juvenile defenders is to "approach all clients in a manner that recognizes that any youth may be LGBT."⁹⁵ This approach addresses the widespread unawareness of many juvenile defenders of their clients' LGBT status.

A. Selective Prosecution Motions

Cases involving statutory rape are the only area in which specific legal mechanisms

89 In re D.B., 950 N.E.2d at 529–30.

90 *Id.* at 530–31.

91 See *id.* at 532 (arguing that the statute violated his due process rights as it was too vague when applied to children under thirteen and that the statute was applied in an arbitrary manner thus violating his right to equal protection).

92 *Id.* at 534.

93 Brief for Juvenile Law Center, et. al. as Amici Curiae Supporting Appellant, In re D.B., 950 N.E.2d 528 (Ohio 2011) (No. 10-0240) at *31–32.

94 Majd et al., *SUPRA* n. 4, at 6–7.

95 *Id.* at 10.



have been recommended for use in the fight for equal treatment of LGBT youth. One article, *Peeking Under the Covers: Taking a Look at Prosecutorial Decision Making Involving Queer Youth and Statutory Rape*, recommends the use of selective prosecution motions.⁹⁶ A selective prosecution motion argues for dismissal based on equal protection grounds—that the defendant was selected for prosecution based on an arbitrary classification, such as their race or religion. Prosecutors occupy a very unique role in the juvenile justice system: ethically, they are barred from discriminating against, or in favor of, an individual based on their race, religion, sexual orientation, or sex.⁹⁷

In *United States v. Armstrong*,⁹⁸ the Supreme Court held that for a court to grant discovery on the claim of selective prosecution, the defendant must make a threshold showing of selective prosecution.⁹⁹ In the case of LGBT status, the defendant must show that the prosecutor targeted him or her while ignoring other similarly situated individuals who were not LGBT.¹⁰⁰ The Court imposed this barrier to ensure prosecutors still retain their broad discretion in choosing their defendants. State courts differ in their standards for what meets this threshold showing of selective prosecution, but this generally requires a defendant to show prosecution based on “an unjustifiable standard such as race, religion, or other arbitrary classification.”¹⁰¹

Claims of selective prosecution based on gender, for instance, have seen success in courts granting access to discovery. For example, in *Massachusetts v. Bernardo B.*,¹⁰² the Massachusetts Supreme Judicial Court granted a motion for discovery concerning selective

prosecution based on gender.¹⁰³ In that case, a fourteen-year-old male was charged with engaging in underage sexual conduct with three other girls, two twelve and one eleven, and no force was involved.¹⁰⁴ The prosecutor chose not to bring any charges against the three girls. Based on these facts, the court ruled that selective prosecution based on gender was possible and ordered the District Attorney to provide statistics on how many statutory rape cases it has prosecuted against only the male juvenile where the conduct was consensual.¹⁰⁵

In the context of sexual orientation, a number of significant barriers exist to the potential success of selective prosecution motions for statutory rape cases. First, sexual orientation is not (yet) a “suspect class” requiring heightened scrutiny, meaning courts will apply the rational basis test for evaluating LGBT youth’s claims.¹⁰⁶ This standard is an extremely low level of review that most often results in the court’s acceptance of patently irrational or false claims of governmental interest, such as those accepted by the Kansas appellate court in the *Limon* case.¹⁰⁷ Second, courts maintain an extremely high level of deference towards prosecutorial decision-making.¹⁰⁸ Third, when proving a selective prosecution motion even af-

103 *Id.* at 848.

104 *Id.* at 837.

105 *Id.* at 843–48.

106 *See* *Massachusetts v. Washington W.*, 928 N.E.2d 908, 912 (Mass. 2010) (holding that though this case involved a selective prosecution on the basis of LGBT status, the court did not have to decide whether sexual orientation qualified as a protected class).

107 *See* *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); *see also* *Kansas v. Limon*, 122 P.3d 22, 28 (determining that the proper standard of review for the equal protection claim was rational basis); Meidinger, *supra* n. 15, at 443–44 (noting that courts will typically use the rational basis test when examining LGBT youths’ selective prosecution claims).

108 *See* *Bernardo B.*, 900 N.E.2d at 842 (commenting that prosecutors should be given a lot of discretion in their charging decisions and those decisions should be presumed to have been made in good faith); *see also* Meidinger, *supra* n. 15, at 443 (commenting that prosecutors have “near-absolute discretion”).

96 *See generally* Meidinger, *supra* n. 15 at 421–425.

97 ABA Criminal Justice Section Standards, *supra* note 101, at 3-3.1(b).

98 517 U.S. 454 (1996).

99 *Id.* at 465–66.

100 *Cf. id.* at 465 (declaring that in this case, to show discriminatory effect, the claimant needed to show similarly situated people of a different race were not prosecuted).

101 *Id.* at 464.

102 900 N.E.2d 908 (Mass. 2009).



ter discovery is granted, defendants face a high burden under *Armstrong*. They must show that the government's prosecutorial policy (1) had a discriminatory effect, and (2) was motivated by a discriminatory purpose, meaning that the prosecutor had specific discriminatory intent.¹⁰⁹ This means that defendants would have to find instances where the government targeted LGBT youth for statutory rape offenses, and

sachusetts Supreme Judicial Court affirmed the prosecutor's "wide discretion" in deciding whether to press charges against Washington, presuming the prosecutor's decision was made in good faith.¹¹² However, the Supreme Judicial Court also affirmed a limited version of a discovery order granted to Washington by the juvenile court to pursue his selective prosecution claim.¹¹³ The court reasoned: "the subtle-

chose not to prosecute similar statutory offenses committed by heterosexual youth, on top of the intent to pursue charges against LGBT youth because of their sexual orientation.

B. Discovery Requests

Despite the significant legal barriers to successful dismissals for selective prosecution, grants of discovery motions to defendants seeking to prove selective prosecution are still beneficial to a youth's fight for equal rights in court. For example, in the case of *Massachusetts v. Washington W*, a sixteen-year-old boy named Washington was accused of having sexual encounters with a thirteen-year-old boy that began when Washington was fifteen.¹¹⁰ When the younger boy's father learned of the alleged sexual activity, he reported Washington to the police, who charged him with two delinquency counts of statutory rape and two delinquency counts of indecent assault and battery on a child under the age of fourteen.¹¹¹

ties behind a decision to prosecute just one youth in the context of same-gender sexual relations suggests that a comparison of similarly situated juvenile defendants . . . may provide more telling and relevant statistical information to support the juvenile's claim."¹¹⁴ In upholding this discovery order, the court also noted, "the historic continuing animosity against homosexual[s,]"¹¹⁵ and the importance of evaluating potential equal protection violations because "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose."¹¹⁶

Therefore, regardless of Washington's success, his motion for selective prosecution and the juvenile court's grant of his limited discovery motion forced the courts to evaluate the serious claim of selective, unconstitutional targeting of LGBT youth, the persisting animosity towards homosexuals, and the possibility that such animosity infects prosecutorial decision-making. This kind of judicial evaluation is criti-

Washington filed a motion to dismiss based on selective prosecution, but the Mas-

109 United States v. Armstrong, 517 U.S. 456, 476 (1996).

110 *Washington W.*, 928 N.E.2d at 910.

111 *Id.*

112 *Id.* at 911.

113 *Id.* at 915.

114 *Id.* at 914.

115 *Id.* at 912-13, n. 5.

116 *Id.* at 912 n.4 (citing *Stemier v. Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997)).



cal in bringing the claims of LGBT youth to light.

Section IV: Expanding Selective Prosecution Motions to other Crimes

The legal standard for granting discovery, and proving selective prosecution, could be applied to a broader range of crimes for which LGBT youth are selectively targeted—particularly for ungovernability and for prostitution crimes. As identified earlier in this paper, LGBT youth are often reported, arrested, and charged for ungovernability and for prostitution based entirely on their sexual orientation or their gender identity. In the case of ungovernability, defense attorneys should be encouraged to file motions for discovery to support selective prosecution motions. As identified by The Equity Project, sometimes parents specifically seek out judicial intervention in attempting to “change” their child’s gender identity or sexual orientation. Particularly in cases where the youth is not charged with any other crime other than ungovernability, a case for selective prosecution can be made by an LGBT youth facing these charges.

Defense attorneys should seek out records of the parent’s contacts with prosecutors, and carefully examine the wording of the charges levied against their client. They should also work together with other juvenile defenders on keeping records of instances where LGBT youth are targeted for ungovernability offenses because of their parent’s rejection of their sexual orientation or gender identity. Similarly, when defending LGBT youth against prostitution charges or other offenses related to sexual conduct, juvenile defenders should explore selective prosecution motions. Defenders can develop a record of police treatment and police questioning of LGBT youth in support of their motions for discovery. As noted by The Equity Project and by Amnesty International, LGBT individuals are profiled by police departments for sex related offenses, and are often wrongly assumed by police to be engaging in prostitution, just for walking down the street. Such

egregious and overtly discriminatory treatment should be documented by juvenile defenders and highlighted for the court in all cases where such arrests result in prosecution.

Section V: The Role of Selective Prosecution Motions & Discovery Requests in the Struggle for LGBT Youth Equality

By incorporating the use of selective prosecution motions and requests for discovery into the defense of LGBT youth for crimes such as statutory rape, prostitution, or ungovernability, juvenile defenders do not just increase the avenues of legal relief for their clients. Such motions can begin to encourage “soft-enforcement” within the justice system to change its treatment of LGBT youth. Professor Anne Poulin described the potential for soft-enforcement in the context of selective prosecution motions:

Soft enforcement is the impact of the judicial process on the voluntary behavior of prosecutors, law enforcement officers, and the public. Even if the court ultimately denied relief, the exposure of disparate treatment through legal process may effect some reduction in improper selective prosecution as the government and the public respond to reduce or eliminate improper disparity.¹¹⁷

If selective prosecution motions at the very least result in successful discovery orders, defense attorneys can begin uncovering potentially troubling patterns of selective prosecutorial decision-making in cases involving LGBT youth. Even if the evidence uncovered does not result in successful dismissals, the detailing of such evidence in court forces prosecutors to face the charges of selective prosecution directly, and potentially encourages them to engage in more equitable decision-making.

The violations of human dignity that arise from such unequal treatment of LGBT youth go to the heart of what the Fourteenth Amendment is designed to protect. Even if

117 Poulin *supra* note 121, at 1090.



such motions are a “long-shot,” or challenging to win, zealous and competent representation of LGBT youth demands that violations of a youth’s fundamental rights be documented, presented, and argued before the courts. The use of selective prosecution motions as a weapon in the fight for equal rights of LGBT youth should therefore be vigorously encouraged and utilized.

Juvenile defenders of course can only utilize this weapon in the context of zealous, committed, client-centered representation demanded by the ethics rules and respect for the privacy and dignity of LGBT clients. Some LGBT youth will no doubt not want to build a legal defense surrounding their gender identity or sexual orientation, and juvenile defenders should always respect the decisions of their clients in this regard. Therefore, defense attorneys must be vigilant in protecting their client’s comfort with exposing or discussing gender identity or sexual orientation in open court. They must refrain from encouraging the exposure of these identities to the point that an LGBT youth feels coerced. In the cases where LGBT clients agree to the use of their gender or sexual identities in their legal defense, defenders must make clients feel empowered, not fearful, of the central role their identity will play in their legal defense.

Conclusion

The substantial abuse, discrimination, and disparate treatment of LGBT youth in the juvenile justice system is a vitally missing part of the public discourse surrounding LGBT rights. Juvenile defenders must capitalize on this significant culture moment and develop an effective strategy toward targeting and fighting the invidious discrimination of LGBT youth in juvenile courts. While resources for juvenile defenders have been developed to inform defense attorneys how to develop meaningful and respectful relationships with LGBT clients and fight for their fair treatment within the system, there are still no resources encouraging juvenile defenders to challenge the disparate

treatment of LGBT youth using legal mechanisms and strategies—and certainly not on the same level that other invidious discrimination against the LGBT population has been challenged in the courts.

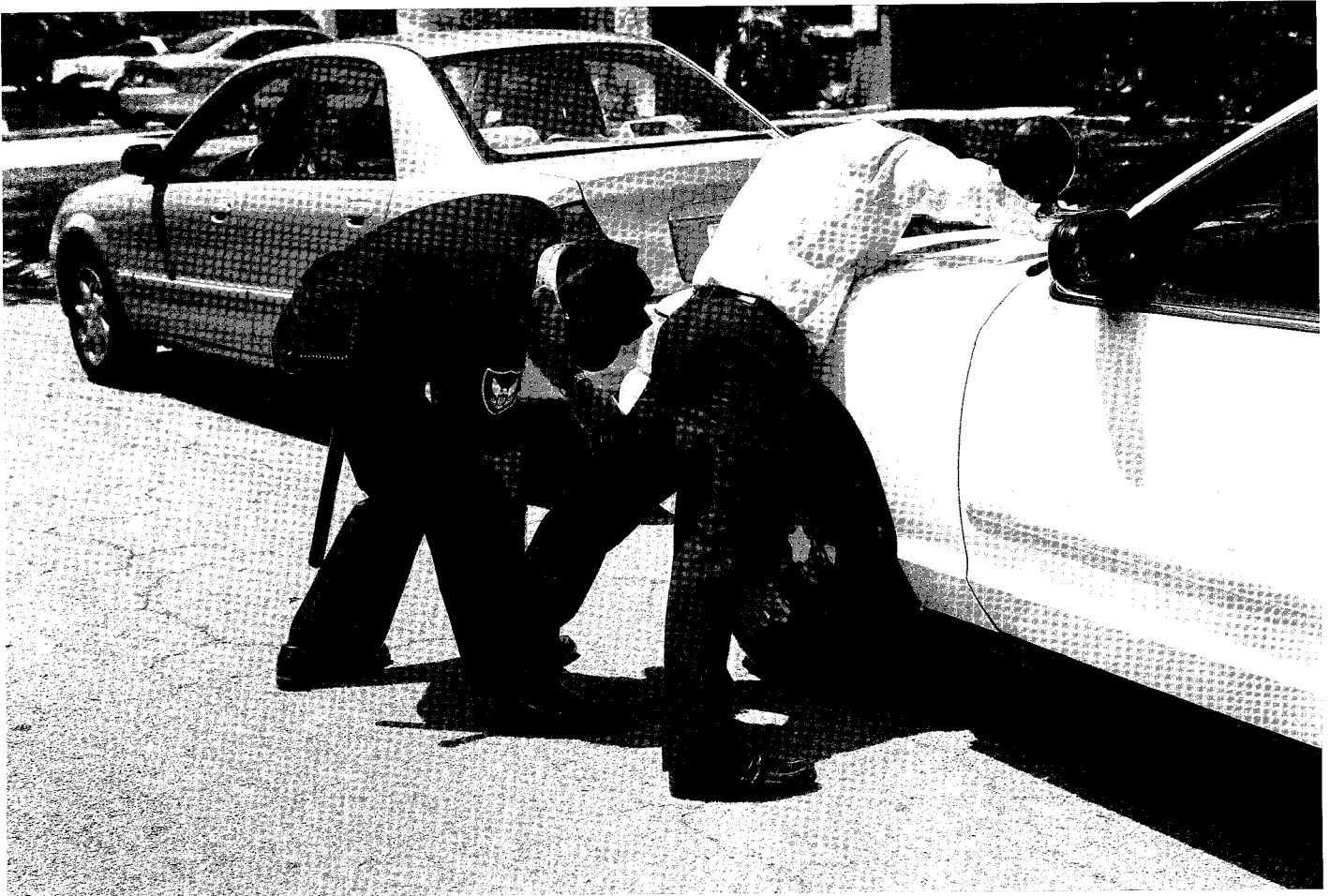
Given the few resources, juvenile defenders should utilize selective prosecution motions and requests for discovery in an effort to demonstrate the disparate treatment among LGBT youths in the juvenile justice system. The benefits of these tools extend far beyond their potential for legal success, which is likely low. Forcing prosecutors to confront claims of selective prosecutorial decision-making, forcing judges to evaluate serious claims of equal protection violations, and exposing the public to evidence of systemic, invidious discrimination in the targeting of LGBT youth can have a broader impact in the fight for equal rights and fair treatment.



About the AUTHOR



Alanna Holt currently practices law as an Assistant Public Defender for Miami-Dade County's Office of the Public Defender. She graduated cum laude from Northwestern University School of Law in 2013, and earned her Bachelor's Degree with Distinction in History and Philosophy from the University of Michigan in 2008. Prior to law school, Ms. Holt served as Policy Coordinator for Washington, D.C. based non-profit organization, The Justice Project, where she worked on a number of criminal justice reform campaigns dedicated to preventing wrongful convictions. During law school, Ms. Holt worked as a summer law clerk for the Habeas Corpus Resource Center in San Francisco as well as the District of Columbia Public Defender Service. She also served as Production Editor for Northwestern's Journal of International Human Rights, President of Northwestern's Public Interest Law Group, and President/Co-founder of Northwestern's Chapter of the National Lawyer's Guild. The views expressed in this article do not reflect the views of the Miami-Dade Office of the Public Defender. Ms. Holt wishes to thank Professor Bernadine Dohrn for her assistance, feedback, and support during the drafting of this article.



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